SUPREME COURT OF THE UNITED STATES.

No. 331.

JOHN WATT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

ISAAC B. KIRTLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 Circuit court of the United States, sixth circuit and eastern district of Louisiana.

I. B. KIRTLAND
versus
JOHN WATT & Co. } No. 3531.

[U. S. rev. stamp of 50c. affixed, and cancelled.]

Petition.—Filed March 18th, 1865.

To the honorable the judges of the circuit court of the United States in and for the sixth circuit and eastern district of Louisiana:

The petition of Isaac B. Kirtland, a citizen of the State of New York, and who now resides in the city of New York, and who is a loyal citizen of the United States, respectfully shows that the commercial firm of John Watt & Co., located in the city of New Orleans, and composed of John Watt, Michael Musson, Andrew Watt, and James L. McLean, all of whom are citizens of the State of Louisiana, are justly and truly indebted in solido to petitioner in the full sum of twenty-nine thousand and five hundred dollars, with interest,

2 for this, to wit:

That on or about the 25th day of February, in the year A. D. one thousand eight hundred and sixty-two, petitioner enclosed from Memphis, in the State of Tennessee, for collection, E. E. Clark's draft on said firm of John Watt & Co. for ten thousand dollars, and that on the first day of March, in the year A. D. 1862, said firm wrote to your petitioner, among other things, as follows:

"NEW ORLEANS, *March 1st*, 1862.

"I. B. Kirtland, esq., Memphis:

"DEAR SIR: Your favor of the 25th ultimo came to hand this morning, covering E. E. Clark's draft on ourselves for $10,000, (ten thousand dollars,) which we have passed to your credit, and hold the same subject to your order at any moment."

That on or about the 25th March, 1862, petitioner enclosed to said firm for collection a draft on Messrs. John Wood & Co. for the sum of ten thousand dollars; that the same was collected by said firm of John Watt & Co., and who, on the 4th of April, 1862, wrote petitioner, among other things, as follows:

3 "NEW ORLEANS, *April 4th*, 1862.

"I. B. Kirtland, esq., Memphis:

"DEAR SIR: Your esteemed favor of 25th ultimo only came to hand this morning, covering draft on Messrs. John Wood & Co. for ten thousand dollars, which was promptly paid on presentation, and the amount we have passed to your credit, holding the same and your previous remittance subject to your order at any moment."

That on or about the 10th April, 1862, your petitioner enclosed to said firm of John Watt & Co. for collection his draft on John

Wood & Co. for the sum of nine thousand and five hundred dollars, which was collected by said John Watt & Co., and who, on the 16th April, 1862, wrote to your petitioner, among other things, as follows:

"NEW ORLEANS, 16*th April*, 1862.

"I. B. Kirtland, esq., Memphis:

"DEAR SIR: Your favor of the 10th instant came to hand this morning.

"We have collected at your credit your draft on Jno. Wood & Co. for $9,500."

4 All of which aforesaid allegations and statements will more fully and correctly appear from said letters of said John Watt & Co., and the detailed bill hereunto annexed and made part of this petition, and marked 1, 2, 3, and 4.

Petitioner avers an amicable demand, and a refusal to pay.

Wherefore, the premises considered, petitioner prays that said firm of John Watt & Co. and the persons composing the same be cited to appear, and each to answer this petition and the annexed interrogatories categorically in writing and under oath within the legal delay; that after due and legal proceedings they be condemned in solido to pay your petitioner the said sum of twenty-nine thousand and five hundred dollars, with interest on the same from the 1st May, 1862, till paid, together with all costs of suit, and for all equitable and general relief in the premises.

(Signed) L. MADISON DAY, *Att'y.*

Interrogatories on facts and articles to be answered categorically in writing and under oath, within the legal delay, by each of said defendants in the above-stated case:

1st. Are not the three letters annexed to this petition the
5 genuine and original letters written and signed, addressed, and sent by the firm of John Watt & Co. to plaintiff?

2d. Is not the signatures to the three letters annexed to this petition the genuine and proper signature of the firm of John Watt & Co.?

3d. By whom was said signatures made? Are they not all in the proper and genuine and proper handwriting of one or more of the members of said firm of John Watt & Co?

Order.

Let each of the defendants herein answer categorically on facts and articles herein propounded under oath and in writing within the legal delay.

New Orleans, March 18th, 1865.

(Signed) E. H. DURELL, *Judge.*

6 *Document* 1.—*Filed with petition March* 18*th*, 1865.

[P'r mail.]

NEW ORLEANS, *April* 4*th*, 1862.

I. B. Kirtland, esq., Memphis:

DEAR SIR: Your esteemed favor of 25th ultimo only came to hand this morning, covering draft on Messrs. John Wood & Co. for ten thousand dollars, which was promptly paid on presentation, and the amount we have passed to your credit, holding the same and your previous remittance subject to your order at any moment.

We have reports that a battle began this morning near Corinth, the termination of which we shall wait for with much anxiety. It is also reported that between 40 and 50 war-vessels have crossed the bar and are in the river below our forts, an attack on which may be momentarily expected; but our people are hopeful, and God grant we may not be disappointed.

Very truly, your friends,

(Signed) JOHN WATT & CO.

7 *Document* 2.—*Filed with petition March* 18*th*, 1865.

NEW ORLEANS, *March* 1*st*, 1862.

I. B. Kirtland, esq., Memphis:

DEAR SIR: Your favor of the 25th ultimo came to hand this morning, covering E. I. Clarke's draft on ourselves for $10,000, which we have passed to your credit, and hold the same subject to your order at any moment.

Throughout the week our city has been intensely excited by the news from Tennessee and Kentucky. Troops are moving daily, and getting prepared to depart for your State or wherever General Beauregard may be. Every man and boy capable of shouldering a gun are soldiers. The banker, the capitalist, the merchant—all, all are preparing to meet the enemy, and leaving business to itself. Nothing whatever is doing, except in the shops, where goods are being purchased for our soldiers, and the selling of some sugar and molasses. But we believe the present month will decide whether or no our independence will be achieved.

We would be much gratified to hear from your occasionally, fully and candidly, on our prospects your way, and we remain, dear
8 sir, Very truly yours,

(Signed) J'N WATT & CO.

Document 3.—*Filed with petition March* 18*th*, 1865.

NEW ORLEANS, 16*th April*, 1863.

I. B. Kirtland. esq., Memphis:

DEAR SIR: Your favor of the 10th instant came to hand this morning. We have collected at your credit your draft on Jno. Wood & Co. for $9,500.

Our senior returned from Corinth two days ago, bringing with him his son Andrew, (very sick from chronic diarrhœa,) and Captain H. Huntington, of the same regiment, (18th La.,) wounded in the leg, and who died of lockjaw at Mr. Whatts's house yesterday morning.

One of the young gentlemen accredited with you about a month ago, Henry Lobit, of the Orleans Guards, has also succumbed
9 to his wounds. These and many other casualties cry aloud for vengeance, which will be freely meted out. Another battle on the Mi. line will achieve the work begun on the 6th instant. Here we are all right and ready, come when they may.

Your friends,

(Signed) JOHN WATT & CO.

Document No. 4.—Filed with petition March 18, 1865.

Mess. John Watt & Co. to I. B. Kirtland, dr.:

1862, Feb'y 25,	E. C. Clark, on yourselves.....	$10,000
1862, March 25,	My No. 8,305 on John Wood & Co....	10,000
1862, April 10,	My No. 8,324 on John Wood & Co....	9,500
Amount due me ex interest.....		29,500

E. and O. E.

Memphis, 12th December, 1864.

10 UNITED STATES OF AMERICA, *State of Tennessee, city of Memphis:*

COMMISSIONER'S OFFICE.

I, Hume F. Hill, commissioner of the State of Louisiana, duly appointed and commissioned by the governor thereof, for the State of Tennessee, to reside in the city of Memphis, and take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions, &c., to be used or recorded in said State of Louisiana, do certify that on this day personally appeared before me I. B. Kirtland, to me known; and he, being duly sworn, says on oath that the annexed account against John Watt & Co., amounting to twenty-nine thousand five hundred dollars, is just and true as stated, and that he has not received any security or satisfaction for the same.

(Signed) I. B. KIRTLAND.

Given under my hand and official seal, this 15th day of December, A. D. 1864.

[SEAL.] (Signed) HUME P. HILL, *Commissioner.*

[5-ct. int. revenue stamp cancelled.]

11 *Citation.*

The President of the United States of America to the marshal of the eastern district of Louisiana greeting:

J. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

You are hereby commanded to summon the commercial firm of John Watt & Co., composed of John Watt, Michael Musson, Andrew Watt, and James L. McLean, all citizens of the State of Louisiana, to comply with the demand of Isaac B. Kirtland, a citizen of the State of New York, contained in the petition, of which a copy accompanies this citation, or to deliver their answer to the same, and answer the interrogatories therein propounded, in the office of the clerk of the circuit court of the United States, sixth judicial circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against them by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the
12 court is held, and that you make due return hereof on the first Monday of April, 1865.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, the 18th day of March, A. D. one thousand eight hundred and sixty-five and of the independence of the United States of America the eighty-ninth year.

[SEAL.] (Signed) F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received March 21st, 1865, and on the same day, month, and year, served a copy of the within citation, plaintiff's petition and interrogatories annexed, on M. Musson personally, at the office of John Watt & Co., No. 3½ Carondelet street, in this city; said M. Musson being one of the firm of John Watt & Co., the defendants to this suit.

(Signed) M. EGAN, *Deputy U. S. Marshal.*

New Orleans, March 21st, 1865.

13 *Answer.—Filed April 5th, 1865.*

Circuit court of the United States, sixth circuit and eastern district of La.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

The defendants herein, John Watt & Co., residing in New Orleans, and loyal citizens of the United States, for answer to the petition filed by plaintiff herein admit that the extracts from the three letters dated the 1st March, 1862, the 4th of April, 1862, and the 16th

Our senior returned from Corinth two days ago, bringing with him his son Andrew, (very sick from chronic diarrhœa,) and Captain H. Huntington, of the same regiment, (18th La.,) wounded in the leg, and who died of lockjaw at Mr. Whatts's house yesterday morning.

One of the young gentlemen accredited with you about a month ago, Henry Lobit, of the Orleans Guards, has also succumbed
9 to his wounds. These and many other casualties cry aloud for vengeance, which will be freely meted out. Another battle on the Mi. line will achieve the work begun on the 6th instant. Here we are all right and ready, come when they may.

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(Signed) JOHN WATT & CO.

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(Signed) I. B. KIRTLAND.

Given under my hand and official seal, this 15th day of December, A. D. 1864.

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12 court is held, and that you make due return hereof on the first Monday of April, 1865.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, the 18th day of March, A. D. one thousand eight hundred and sixty-five and of the independence of the United States of America the eighty-ninth year.

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(Signed) M. EGAN, *Deputy U. S. Marshal.*

New Orleans, March 21st, 1865.

13 *Answer.—Filed April 5th, 1865.*

Circuit court of the United States, sixth circuit and eastern district of La.

I. B. KIRTLAND *vs.* JOHN WATT & Co. } No. 3531.

The defendants herein, John Watt & Co., residing in New Orleans, and loyal citizens of the United States, for answer to the petition filed by plaintiff herein admit that the extracts from the three letters dated the 1st March, 1862, the 4th of April, 1862, and the 16th

April, 1862, as set forth in said petition, are contained in said letters, and that the same were written by defendants to plaintiff under the dates aforesaid; but, further answering, defendants say that, on or about the 20th of February of the same year, the party referred to in plaintiff's petition, E. E. Clarke, of Memphis, Tennessee, being then in New Orleans, left with defendants ten thousand dollars in notes of the so-called confederacy, advising them at the same time that on his return to Memphis he should draw on them for the amount deposited.

14 That, shortly after his return to Memphis, he drew the draft for ten thousand dollars referred to in plaintiff's petition in favor of plaintiff, who remitted it to defendants, as is by him alleged. That, at the date of the remittance of the two drafts on John Wood and Company for the sum of ten thousand and nine thousand five hundred dollars, plaintiff was well aware that no money was current but the notes of the so-called confederacy, and that plaintiff well knew when he drew the drafts and remitted them to defendants for collection on his account that they would and must be paid in that currency, and that when defendants advised him that the drafts had been paid and the amount passed to his credit that it was so passed and credited in that currency.

Defendants, further answering, aver that, so soon as they had reason to apprehend that loss might result from holding these notes, of which plaintiff was as well aware as themselves, they reminded plaintiff that the amount at his credit, as he well knew, had been collected in these notes, and again and again, and particularly on the 21st of May, 1862, the 4th of June, 1862, and on subsequent

15 dates, requested his instructions in relation to these notes, to which communications he either gave no answer or avoided any direct instructions, with the evident object of throwing upon defendants any loss which might result from the depreciation of his funds, as his latter letters openly avow.

Defendants have always been ready to surrender to plaintiff the notes by them received on his account, which have been in their possession from the time they were by them received, but deny that they are, under the facts set forth, indebted to him in any other form, or that they can be compelled to pay to him the amount of his demand in current funds or legal tender. They pray to be dismissed with costs and for general relief in the premises.

(Signed) EDWARD BRIGS, *for Defendants.*

Minute of evidence.—Filed May 5th, 1865.

I. B. KIRTLAND *vs.* JOHN WATT & CO. } No. 3531.

16 Plaintiff offered in evidence letters 1, 2, 3, and document 4, filed with petition.

Defendants offered in evidence document 5.

M. Musson sworn: Never has seen Mr. Kirtland write.

Letter No. 5 was received by our house from him.

We carried on a correspondence with the party; the handwriting to letter 5 is similar to other letters from Kirtland to us.

The court grants leave to defendants until to-morrow, 6th instant, to file their affidavit for a continuance, which was this day denied to them.

Document 5, *offered in evidence by defendants, and filed May 5th*, 1865.

OFFICE OF THE JACKSON INSURANCE COMPANY.

17 (*I. B. Kirtland, president,*) *Memphis, February* 25, 1862.

Mess. John Watt & Co.:

DEAR SIRS: I hand for my a'c E. E. Clarke on your house $10,000. I beg to send my best respects to you, Mr. Watt. Mr. Clark says Mr. W. bears the troubles of war pretty well.

Your friend,

(Signed) I. B. KIRLAND.

Hearing and submission of cause.—From the minutes of May 5th, 1865

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

This cause was called for trial: L. Madison Day, esq., for plaintiff; Edward Briggs, esq., for defendants.

And the court having refused the continuance applied for by the defendants, the trial proceeded, and after hearing the plead-
18 ings and evidence, the cause was taken under advisement.

Judgment.—From the minutes of May 15, 1865.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

The court having considered this cause, doth now, by reason of the law and the evidence, order, adjudge, and decree, that the plaintiff, Isaac B. Kirtland, do have and recover judgment against the defendants, the commercial firm of John Watt & Co., and against John Watt, Michael Musson, Andrew Watt, and James L. McLean, the members thereof in solido, for the sum of twenty-nine thousand and five hundred dollars, with interest thereon, at the rate of five per centum per annum, from the 1st May, 1862, until paid, and costs of suit.

Judgment rendered May 15th, 1865.

Judgment signed June 2d, 1865.

(Signed) E. H. DURELL, *Judge.*

19 *Affidavit of defendants for new trial.—Filed May 18th, 1865.*

United States circuit court.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

Michael Musson, one of the defendants herein, being duly sworn, says that since the judgment rendered in this cause he has discovered evidence material to his defence in his suit, to wit: two drafts drawn by plaintiff on John Wood & Co., in favor of defendants—the one for ten thousand dollars, dated the 25th of March, 1862, the other for nine thousand five hundred dollars, dated the 10th April, 1862, on which, in part, such suit was instituted. That said drafts are not payable in money, but are expressly stated on the face of each to be payable in currency, and which currency was confederate notes, the only currency at their respective date existent in New Orleans. That the drawees, in whose possession they of course remained when paid, had long left the city, and the deponent did not know nor had
he reason to believe that any of their books or papers were,
20 when this cause was tried, within the same, they having no
representative therein. That although deponent used every effort and diligence in his power to obtain these documents, he failed to discover them until after the rendition of the judgment herein, when, in conversation with W. S. Mount, esq., who now occupies the building formerly occupied by Jno. Wood & Co., he learned, on the 15th day of the present month, that some books and papers belonging to said Jno. Wood & Co. had been left behind, the nature of which said Mount knew nothing, but amongst which, after long search, deponent discovered the drafts aforesaid, which are the drafts on which defendant's pretended indebtedness to plaintiff is predicated. That deponents had no reason to believe, or in the most remote manner to suspect, that said Mount had any knowledge of the existence of said drafts, or that any such testimony could be procured, and was entirely ignorant of the residence of any of the members of the firm of John Wood & Company, and he believes that these drafts, together with the correspondence which the court refused to receive as evidence,
would have proved that defendants were, as they always main-
21 tained, and advised plaintiff, liable to him as his agents for the
amount received by them on his account in the currency in which it was received by them, and which they advised him again, and again was at his disposal; all of which deponent is prepared to show, if a new trial be granted him.

(Signed) M'EL MUSSON.

Sworn to and subscribed before me this 18th day of May, 1865.

(Signed) F. B. VINOT, *Deputy Clerk.*

Rule and grounds for a new trial.—From the minutes of May 18th, 1865.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

On motion of Edward Briggs, esq., of counsel for defendants, it is ordered that the plaintiff show cause on Monday, the 22d day of May, 1865, at 11 o'clock a. m., why a new trial should not be
22 granted in this cause on the following ground: that defendant has discovered, since the trial, evidence important to the cause he could not with due diligence have obtained them before.

Marshal's return.

Received, May 19th, 1865, and on the same day, month, and year, served a copy of the within rule on L. M. Day, esq., personally.
May 19th, 1865.
(Signed) M. EGAN, *Deputy U. S. Marshal.*

Affidavit of defendant for continuance of rule.—Filed May 20th, 1865.

Circuit court of the United States.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

23 Michel Musson, one of the defendants herein, says that he is unable to proceed to the trial of this cause, because E. E. Clarke, an important witness for said defendant, is at present absent from this city, and without the jurisdiction of this court; that his usual residence has been Memphis, to which place defendants addressed a letter on the fifteenth of last month, with the view, if there, of sending a commission to take his evidence, and that failing to receive an answer, defendants sent a special messenger to ascertain to what point said commission should be sent, and believes that said E. E. Clarke is now either in Memphis or New York, and that he has used every effort practicable to obtain the testimony of said witness, without success, and that this application is not made for the purpose of delay, but merely to obtain testimony which is material to the defence.
(Signed) M'EL MUSSON.

Sworn to and subscribed before me this 20th day of May, 1865.
(Signed) F. B. VINOT, *Deputy Clerk.*

24 *Order and continuance of rule.—From the minutes of May 22d, 1865.*

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

The rule herein taken by defendants on the 18th instant was called for trial, and by consent of counsel ordered to be continued till Wednesday next, 24th instant, at 11 a. m.

Order and continuance of rule.—From the minutes of May 24, 1865.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

The rule herein taken by defendants on the 18th instant was called for trial, and by consent of counsel ordered to be continued until to-morrow.

25 *Order and continuance of rule.—From the minutes of May* 25, 1865.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

By consent the rule herein taken by defendants is continued until Saturday next, 27th instant.

Hearing and submission of rule.—From the minutes of May 27th, 1865

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

The application herein made on behalf of defendants for a new trial came on to be heard: L. M. Day, esq., appearing for plaintiff; Wm. H. Hunt, esq., for defendants. After argument the same was submitted to the court.

26 *Bill of exception of defendants.—Filed May* 31, 1865.

United States circuit court.

I. B. KIRTLAND
vs.
JOHN WATT & Co. } No. 3531.

Be it remembered that, on the day on which the above-entitled cause was fixed for trial, Edward Briggs, of counsel for defendants, and in their behalf, asked for a continuance of the same, on the grounds set forth in the affidavit of Michel Musson, one of the defendants, to wit, the absence of E. E. Clarke, a witness, whose testimony is material to the defence, and whose residence is to defendants unknown, and who would prove that the amount of $10,000 (ten thousand dollars) against which plaintiff remitted his first draft was, by the said E. E. Clarke, deposited with the defendants in confederate notes to plaintiff's knowledge, and that said draft was paid for by said plaintiff to said Clarke in that currency; and further that he offered in evidence four letters from plaintiff to defendants, dated March 23d, 1862, April 10th, 1862, May 24th, 1862, and March 11th, 1863, and marked 2, 3, 4, 5, which letters, together with the affidavit of
27 Michel Musson aforesaid, are annexed to this bill of exception as part thereof, and which letters were offered with the view to prove that the drafts which form the basis of plaintiff's demand

were drawn against confederate currency; and the court refused the continuance asked for, upon the ground that the testimony of the witness, Clarke, would not avail defendants on their defence from the fact that, having collected said drafts and credited them on account to plaintiff, they had made themselves responsible to him for payment whenever he should choose to demand the proceeds from them; and the court on the same grounds refused to admit the four letters aforesaid; to which ruling of the court defendants tender this bill of exceptions.

(Signed) E. H. DURRELL, *Judge.*

Letter marked 2, *annexed to defendants' bill of exceptions.*

OFFICE OF THE JACKSON INSURANCE COMPANY,
(I. B. Kirtland, president,) Memphis, March 25, 1862.

Messrs John Watt & Co.:

DEAR SIRS: I beg to hand my No. 8305—$10,000, for my ac. I am glad to hear so good an account of Mr. Watt's eldest son. It
28 is so lamentable that such families must engage in such a miserable war.

We have pretty good hope for our river defences. If the boats of Montgomery reach us very soon, and are what we hear, I have no doubt we shall "use up" their fleet, and make a show up the Ten—e on land near Corinth, we have no fears.

Yours truly,
(Signed) I. B. KIRTLAND.

Letter marked 3, *annexed to defendants' bill of exceptions.*

OFFICE OF THE JACKSON INSURANCE COMPANY,
(I. B. Kirtland, president,) Memphis, April 10th, 1862.

Messrs. John Watt & Co.:

DEAR SIRS: I hand for ac. my No. 8324—$9,500.

I am favored with y'r letter of 4th, and regret to hear the federals are crowding up y'r river. You doubtless hear fully about Corinth. The struggle must have been severe, against large odds. May our God give us full success. We are not certain Island No. 10 has surrendered.

Your friend,
(Signed) I. B. KIRTLAND.

29 *Letter marked* 4, *annexed to defendants' bill of exceptions.*

MEMPHIS, *May* 24, 1862.

Messrs. Jno. Watt & Co.:

GENT.: I am just in receipt y'r fav. 21st instant, per Mr. Simmonds, and beg to reply.

You will see by reference that I sent you checks on Mess. Jno. Wood & Co., and intimated that I expected the funds to remain with you.

I did not intend to use the money at present, nor have I now any use for it. Should such use arise I will check on you.

Very truly your friend,

(Signed) I. B. KIRTLAND.

Letter marked 5, *annexed to defendants' bill of exceptions.*

OFFICE OF THE JACKSON INSURANCE COMPANY,
(I. B. Kirtland,) president, Memphis, Mar. 11*th*, 1863.

Messrs. John Watt & Co.:

DEAR SIRS: I am fav'd with your letter of the 7th ult., and
30 am glad to hear from you after so long silence.

In relation to the matter of your letter you will bear in mind we sent you checks and not confederate treas. notes; said checks called for currency, and we are ready now to take the currency of your city or banks.

We presume your business has been very light this season.

Here there is a small amount of cotton sold, but it brings a large amount of money.

With hopes of better days for our country, I am yours, very truly,

(Signed) I. B. KIRTLAND

Order dismissing rule.—From the minutes of May 31, 1865.

I. B. KIRTLAND
vs. } No. 3531.
JOHN WATT & Co.

The court perceiving no reasons to disturb the judgment rendered in this case, ordered that the application herein made on part of the defendants for a new trial be refused.

31 *Petition for writ of error.—Filed June* 14*th*, 1865.

I. B. KIRTLAND,
vs. } No. 3531.
JNO. WATT & Co.

To the honorable the circuit court of the United States for the sixth circuit and eastern district of Louisiana:

The petition of John Watt, Michel Musson, Andrew Watt, and James L. McLean respectfully shows:

That they are aggrieved by the final judgment rendered against them at the suit of Isaac B. Kirtland, numbered three thousand five hundred and thirty-one of the docket, and are informed that there is error therein to their prejudice, and they are desirous that a writ of error be allowed them therefrom to the Supreme Court of the United States. Wherefore they pray that a writ be allowed them,

returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas, upon their giving bond in such amount as the court may order.

(Signed) ED. BRIGGS, *of Counsel.*

32 *Order granting writ of error.—From the minutes of June* 14, 1865.

On motion of Edward Briggs, esq., of counsel for defendants, and on his presenting and filing the petition of said defendants representing that they are aggrieved by the judgment rendered against them herein, and praying a writ of error therefrom to the Supreme Court of the United States, it is ordered that a writ of error be allowed to the next term of the Supreme Court of the United States, and that the same operate as a supersedeas, upon defendants giving bond, according to law, in the penal sum of forty-five thousand dollars, with John Heddleston, George A. Freret, and Edward Briggs as sureties thereon.

[U. S. rev. stamp of 50 cts. affixed and cancelled.]

Bond for writ of error.—Filed June 14, 1865.

Know all men by these presents, that we, John Watt & Co., as principals, and Edward Briggs, John Heddleston, and George A. Freret, all of the city of New Orleans, as sureties, are held and firmly bound unto Isaac B. Kirtland in the full and just sum of forty-
33 five thousand dollars, to be paid to the said Isaac B. Kirtland, his certain attorney, executors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 14th day of June, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas lately at a circuit court of the United States, sixth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Isaac B. Kirtland is plaintiff, and John Watt & Co. are defendants, judgment was rendered against the said John Watt & Co., defendants, and the said John Watt & Co. having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Isaac B. Kirtland, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

34 Now the condition of the above obligation is such, that if the said John Watt & Co. shall prosecute their writ to effect, and answer such judgment and all damages and costs, if they fail to make their plea good then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN WATT & CO. [L. S.]
(Signed) EDWARD BRIGGS. [L. S.]
(Signed) GEO. A. FRERET. [L. S.]
(Signed) J. HEDDLESTON. [L. S.]

Sealed, signed, and delivered in presence of

(Signed) F. B. VINOT.

35 *Writ of error.—Filed June* 14, 1865.

36 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the sixth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Isaac B. Kirtland, plaintiff, and John Watt & Company, defendants, a manifest error hath happened, to the great damage of the said John Watt & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 14th of June, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] CH'S CLAIBORNE,
Clerk of the United States Circuit Court
for Eastern District of Louisiana.

37 Indorsed: United States circuit court. No. 3531. John Watt & Co., pl't'f in error, *vs.* I. B. Kirtland, def't in error. Writ of error.

Filed June 14th, 1865.

F. B. VINOT, *D'y Cl'k.*

Copy of a writ of error lodged in the clerk's office, and filed June 14*th*, 1865.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the sixth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Isaac B. Kirtland, plaintiff, and John Watt & Company, defendants, a manifest error hath happened, to the great damage of the said John Watt & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done

to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 14th of June, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] (Signed) CHARLES CLAIBORNE,
Clerk of the United States Circuit Court
for Eastern District of Louisiana.

39 Indorsed: United States circuit court. No. 3531. John Watt & Co., plaintiff in error, *vs.* I. B. Kirtland, def't in error. Writ of error. Copy of writ of error lodged in the clerk's office of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, in pursuance the statute in such cases made and provided, this 14th day of June, 1865.

(Signed) ED. BRIGGS,
Attorney of Plaintiff in Error.

Filed June 14th, 1865.
(Signed) F. B. VINOT, *D'y Clerk.*

Citation in error.

40 The United States of America, eastern district of Louisiana.

The President of the United States to Isaac B. Kirtland.

I. B. KIRTLAND
vs.
JOHN WATT & CO., plaintiffs in error. } No. 3531.

greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, wherein John Watt & Co. are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in said judgment mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-five.

E. H. DURELL, *Judge.*

41 Indorsed: United States circuit court. No. 3531. I. B. Kirtland *vs.* John Watt & Co., plaintiffs in error. Citation in error.

Marshal's return.

Received June 16th, 1865, and on the 19th day of same month and year served a copy of the within citation in error on I. B. Kirkland, by leaving it in the hands of L. M. Day, esq., he being attorney for said Kirkland, who is absent from the city.

Returned June 19th, 1865.

M. EGAN,
D'y U. S. Marshal.

42 United States of America, circuit court of the United States, sixth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, Charles Claiborne, clerk of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, do hereby certify that the foregoing 41 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of I. B. Kirtland *vs.* John Watt & Co., No. 3531 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 25th day of September, A. D. 1865.

[SEAL.] CH'S CLAIBORNE, *Clerk.*

[U. S. rev. stamp of 5 cts. affixed and cancelled.]

I, Edward H. Durell, United States judge for the eastern district of Louisiana, do hereby certify that Charles Claiborne, whose name is signed to the above certificate as clerk of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 25 day of September, A. D. 1865.

E. H. DURELL, *Judge.*

[U. S. rev. stamp of 5 cts. affixed and cancelled.]

Filed December 9, 1865.

+

Supreme Court of the United States.

December Term, 1867.

JOHN WATT & CO.,

versus

ISAAC B. KIRTLAND.

No. 73.

BRIEF OF PLAINTIFFS IN ERROR.

HENRY STANBERY,
J. HUBLEY ASHTON,
Of Counsel.

McGill & Witherow, Printers and Stereotypers, Washington, D. C.

Supreme Court of the United States.

No. 73.

DECEMBER TERM, 1867.

JOHN WATT & CO., PLAINTIFFS IN ERROR,

vs.

ISAAC B. KIRTLAND.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

STATEMENT, EXCEPTIONS, AND POINTS OF PLAINTIFFS IN ERROR.

STATEMENT.

This was an action brought by Isaac B. Kirtland, a citizen of New York, against the firm of John Watt & Co., citizens of Louisiana, in the United States District Court at New Orleans, on the 18th of March, 1865, to recover the sum of $29,500, with interest from May 1, 1862.

The pleadings in the court below consist of a general petition by the plaintiff, setting out certain facts upon which the supposed liability of the defendants arose, and an answer on the part of the defendants, according to the practice prevailing in the State courts of Louisiana.

Three separate transactions, which occurred during the rebellion, while both parties were residing in rebel States, are alleged as the foundation of this claim:

1. In February, 1862, the plaintiff being the holder of a draft upon the defendants, purporting to be for $10,000,

transmitted the same from Memphis, where he lived, to the defendants, at New Orleans, "for collection." On March 1, 1862, the defendants wrote to plaintiff: "Your favor of 25th ult. came to hand, covering E. E. Clarke's draft on ourselves for $10,000, which we have passed to your credit, and hold the same subject to your order."

2. On March 25, 1862, the plaintiff sent a second draft, purporting to be for $10,000, drawn by him on Wood & Co., of New Orleans, to the defendants, "for collection." This was collected by defendants, who wrote to plaintiff: "The amount we have passed to your credit, holding the same, and the previous remittance, subject to your order at any moment."

3. On April 10, 1862, still a third draft, on its face for $9,500, drawn upon Wood & Co., of New Orleans, was transmitted to the defendants, "for collection." The defendants wrote: "We have collected at your credit your draft on Jno. Wood & Co., for $9,500."

The *Answer* shows: *First.* That the only currency existing and circulating at New Orleans, when these drafts were received, consisted of Confederate treasury notes; *Second.* That the Clarke draft was drawn against certain Confederate notes, of the nominal value of $10,000, held by the defendants on deposit for the benefit of the drawer, Clarke; *Third.* That the Wood drafts were paid to the defendants in Confederate notes; *Fourth.* That the plaintiff was fully aware, when the defendants spoke of crediting him with these payments, that they so credited him in the currency with which they had been paid; and *Fifth.* That shortly afterwards, and frequently, the defendants requested the plaintiff's instructions in regard to the disposition of the notes they had received, but such instructions were never sent, "with the evident object of throwing upon the defendants any loss which might result from the depreciation of the funds." (Rec. p. 6.)

The case was tried without a jury. The only evidence on behalf of the plaintiff consisted of the letters of defendants acknowledging the receipt and collection of the several

drafts mentioned. The judgment went against the defendants for the full amount claimed, and to reverse this judgment they have sued out the present writ of error.

EXCEPTION.

After the three letters of the defendants, mentioned above, had been given in evidence, the defendants offered to give in evidence, on their behalf, four certain letters from the plaintiff, dated respectively March 25, 1862, April 10, 1862, May 24, 1862, and March 11, 1863, with a view to prove, *inter alia*, that the said drafts were not payable in money, but that all of the same were made payable in, and drawn against, Confederate notes, the only currency, at their respective dates, existing in New Orleans. This offer of evidence the court rejected, and refused to admit the letters of plaintiff in evidence, on the ground, as stated in the bill of exceptions, "that the said letters would not avail the defendants, from the fact that having collected said drafts and credited them on account to plaintiff, they (the defendants) had made themselves responsible to him (the plaintiff) for payment whenever he should choose to demand the proceeds from them." (Rec., p. 11.) The defendants excepted to this decision of the court. Another exception was taken to the ruling of the court against an application of the defendants for a continuance of the cause. The only question, however, which is before this court upon the *bill of exceptions* seems to be as to the admissibility of the letters ruled out by the court below.

FIRST POINT.

The court clearly erred in refusing to admit in evidence the letters offered by the defendants.

(*a.*) Two of them were the letters of the plaintiff transmitting the drafts to the defendants for collection. The other two were acknowledgments by the plaintiff of the receipt of letters from the defendants, written by them immediately after the transactions in question; and they contain, as ap-

pears, distinct reference to the subject-matter of those transactions.

(*b.*) Independently of any question as to the effect of the evidence thus offered, the plaintiff's letters were clearly and indubitably admissible, if upon no other ground, for the reason that they constituted a part of the *res gestæ*, if not the *res gestæ* itself. (1 Phillipps on Evidence, 185, *et cas cit.*)

(*c.*) But they bore directly and closely upon all the vital questions in the case—the general character of the transactions between the parties upon which the claim arose; their actual legal relation in those transactions, whether that of principal and agent, or debtor and creditor; the correct interpretation of the defendants' letters, admitted in evidence by the court; the understanding of the parties with respect to the avails of the drafts collected by the defendants, and, above all, the precise character and extent of the obligation assumed by the defendants in respect to those avails. And when the court excluded these letters of the plaintiff, and attempted to adjudicate between the parties upon the effect of the letters of the defendants alone, it deliberately closed its eyes to the only light by which the legal merits of the claim could be discerned.

(*d.*) For this error, if for no other, the judgment should be reversed.

SECOND POINT.

The letters of the plaintiff, offered in evidence by the defendants and rejected by the court, especially when read in connection with the *answer* of the defendants, clearly prove that the only relation which the defendants ever held to the plaintiff, in respect to the avails of these drafts, was that of agents, or gratuitous bailees, and that they cannot, therefore, be held liable for the depreciation of those avails.

(*a.*) The transaction was this: The defendants were *merchants*, not *bankers*, in New Orleans. They undertook, without consideration, at plaintiff's request, to collect the drafts. They received payment in the only existing currency, Con-

federate paper. This the plaintiff must be understood to have impliedly authorized. Up to this time clearly the defendants were nothing but *agents*. When the notes came into their possession, they held them as naked bailees. Afterwards, the theory of the plaintiff is, the relation changes. The defendants, from agents for the collection, and bailees having the custody, of so many Confederate treasury notes, are turned into debtors to the plaintiff for so much lawful money, recoverable in an action for money loaned.

(*b.*) Now, in respect to this most extraordinary claim, several things may be briefly observed:

1. The burden of establishing such a change of relation was, and is, on the *plaintiff*. He must show affirmatively, either that the defendants actually *used* the avails in question, or undertook, upon a sufficient consideration, to render themselves liable as debtors to the plaintiff for the face of the notes in money.

2. There is absolutely no evidence that the defendants did use the avails. Not only this; the answer and the rejected letters show that they did *not* use them, and that they always remained in their possession for delivery to the plaintiff.

3. The case is not to be treated as if the defendants were *bankers*, and cannot be decided by applying the principles of law applicable to that relation.

In this case, nothing less than an *express* agreement between the parties to treat the avails of the drafts as *money*, and to pass the title thereof to the agents, will support the claim of this plaintiff, in the absence of evidence of an actual conversion of the avails to the defendants' use.

4. No such agreement is proved. The fact of conversion is negatived by the effect of the answer and the correspondence.

THIRD POINT.

If the defendants, upon the facts alleged in the pleadings, are liable to the plaintiff for any greater amount than the *value* of the Confederate notes which they had received, at the time of the suit, they are liable, upon those facts, merely

for the *value*, in lawful money, of the Confederate notes at the *time they were so received*, and not, under any circumstances, for the *nominal amount* of those notes in lawful money of the United States.

(*a.*) It may be admitted, for the purposes of this point, that the defendants, when they credited the avails of the drafts to the plaintiff, intended to take the title to the notes, and to substitute therefor their personal liability to the plaintiff; yet we contend that the extent of the liability which they assumed was to answer for the actual value of those avails *when* they were received and credited in lawful money.

(*b.*) Clear authority for this proposition is found in the case of MARINE BANK *vs.* FULTON BANK, 2 Wallace, 254. There the defendants were bankers, engaged in general business as such. They were employed as agents to collect drafts upon Chicago, at a time when the only currency there was a depreciated paper one. Instead of reserving the avails of the checks, collected with knowledge of the plaintiffs in this currency, as a specific deposit, subject to the order of plaintiffs, they used the notes in their ordinary business, and credited the plaintiffs for the amount of the collections. The question was as to the measure of damages, and this court held that the instruction of the court below to the jury was correct, to wit, that the plaintiffs were entitled to recover the *value* in money of the Illinois currency *at the time it was received* by the defendants. It was then from five to ten cents below par, having afterwards depreciated to fifty cents below par.

(*c.*) It cannot be plausibly urged that the defendants in the case at bar, when they credited the plaintiff with the avails of these drafts, intended to assume, or that the plaintiff understood that they assumed, a liability beyond the actual value of the currency they had received in payment of the drafts. For, while the use of those notes might be held, in the aspect of the case now presented, to be a sufficient consideration for an implied promise to pay the market value of the notes at the time they were so used, yet the party alleging

another promise, by the defendants, to be answerable for the par value of the notes at that time, must be prepared to show some other new and different consideration proceeding to the defendants, and such a consideration must be established before such an extended liability can be enforced against them.

FOURTH POINT.

There can be no recovery by the plaintiff in this action, because the alleged contract of the defendants, sought to be enforced, was founded, if upon any consideration, upon a consideration clearly and totally illegal, to wit, the employment by the defendants of a quantity of Confederate treasury notes which were issued, circulated, and used not only in violation of law, but for the purpose of displacing the lawful money of the United States, and in support and furtherance of a general conspiracy, throughout the territory where the parties were domiciled, to destroy the sovereignty and Government of the United States.

(*a.*) Unless this court is prepared to say that transactions begun and carried on upon the basis of this unlawful and hostile currency, between parties within the insurrectionary jurisdiction, can furnish a valid consideration for an express or implied contract between such parties, which may be enforced in the courts of the nation; a proposition which no lawful sovereign judicature was ever asked, under similar circumstances, by offending and rebellious subjects, to lay down; then plainly there can be no recovery here, and no recovery should have been had in the court below, in this action.

Lord Ellenborough regretted that the courts of England "had ever departed from the plain and intelligible rule, that when the contract is founded upon a consideration clearly illegal, neither party should be allowed a *locus standi*, and to receive assistance in a court of justice." "This," said that great judge, "is a broad principle, which no one could well misapprehend, and we have got into some difficulty by receding from it." (Smith *vs.* Beckmore, 4 Taunt., 477.)

The judicial eye can scarcely foresee the consequences which will flow from receding from that principle in this case, and similar cases, yet to come before the courts of the United States from the Southern States.

(*b.*) On March 6, 1861, the rebel congress passed an "Act recognizing the existence of war between the United States and the Confederate States;" also, "An act for the establishment of the army of the Confederate States;" and also, "An act to authorize the issue of Treasury notes." The last was followed by numerous other enactments, putting in circulation large quantities of those notes, "payable six months after the ratification of a treaty of peace between the United States and the Confederate States." (Rebel Statutes at Large, 47, 116.) It was these notes, thus issued and circulated, that constituted the consideration of the supposed contract or promise here sought to be enforced. The theory is that the parties agreed to treat these notes as so much lawful money; that the defendants, in crediting the plaintiff with the avails of the drafts, agreed to pay the plaintiff twenty-nine thousand dollars, lawful money, on demand, and that this engagement is enforcible at law in the national courts. The whole consideration of the supposed contract consisted, therefore, of these notes.

(*c.*) It requires no argument to show that the emission, circulation, and employment of these notes were repugnant to every line and letter of the Constitution. The men who dealt with and in them, and helped, by their dealings, to give them currency and credit, aided and abetted the rebellion equally with those who bore arms against the United States.

(*d.*) By a principle of universal jurisprudence, therefore, the supposed contract of the defendants cannot be enforced, bottomed, as it was, upon transactions in these illegal notes, and supported, as it is, by no other consideration whatever.

Armstrong *vs.* Toler, 11 Wh., 258.

Brown *vs.* Tarkington, 3 Wall., 381.

A striking illustration of the doctrine of these leading authorities is found in the case of CRAIG *vs.* THE STATE OF MISSOURI, (4 Pet., 410,) when the courts were asked to en-

force the payment of a note given for bills of credit issued by the State. This court said, no. It declared that the promise was made in consideration of an act forbidden by the Constitution, "the highest law of the land, and was utterly void."

Another case to the same effect is PATTON *vs.* NICHOLSON, 3 Wheaton, 207, where a note given by one citizen to another for a British license, procured without any intercourse with the enemy, was the subject of suit. The court held that the consideration was void, though the parties were both citizens, and refused to enforce the promise.

In many of the Southern States both State and Federal courts have refused to enforce executory contracts performable, according to their terms or their actual consideration, by the payment of Confederate notes. Few of them are, perhaps, yet reported; but a recent case in the District Court for Mississippi, of which we have a bare note, illustrates the class. It is *Nordlinger* vs. *Varden*, where A sold property during the war to B for fifteen thousand dollars, to be paid in Confederate notes. *Held*, that A could not sue on this contract, nor on a note for fifteen thousand dollars, given to secure payment, though the note did not specify in what currency payment should be made. (Am. Law Rev., Oct., 1867, p. 188.)

(*e.*) The demand here made is a most unconscionable one. Whatever obligation the defendants entered into, it is *certain* that it was not to pay this plaintiff twenty-nine thousand lawful dollars of the *United States*. The transaction was between parties in the rebel States. Its subject-matter was rebel currency. The debt, if any was created, was payable according to the intention of the parties in *that* currency, or other lawful money of the "*Confederate States*." Let the parties fall where they stood.

FIFTH POINT.

But, independently of and aside from the foregoing argument, the defendants are not liable to this action before

demand made for the payment of the money, and no *demand* appears to have been made by the plaintiff.

(*a.*) The principle is clear, that an agent is not liable to an action for money collected, or received, without an *actual demand* by the principal before suit is brought. This is a *condition precedent* to the right of action, as the following authorities fully show:

Taylor *vs.* Bates, 5 Cowen, 376.
Rathburn *vs.* Ingalls, 7 Wendell, 321.
Ferris *vs.* Paris, *et al.*, 10 John., 284.
Cooley *vs.* Betts, 24 Wendell, 204.

It has been held, in this country, that a *bank* is not liable to an action without a previous demand. In WATSON *vs.* PHŒNIX BANK, (8 Metcalf, 221,) the court said: "When money is deposited in a bank, to be drawn at the pleasure of the depositor, the bank is not liable to an action without a previous demand. *The request is parcel of the contract, and must be proved.*"

Downes *vs.* Bank, 6 Hill, 297.
Johnson *vs.* Bank, 1 Harrington, 117.

The bringing of the action is *not* a sufficient request.

(*b.*) Upon what ground the court liquidated the *interest* from May 1, 1862, and gave judgment with interest from that day, it is difficult to conjecture. This also is clear error, for which the judgment must be reversed.

(*c.*) The letters of plaintiff, rejected by the court below, clearly show that demand was *not* made for payment then or afterwards.

SIXTH POINT.

For the error indicated in our first point, and for the error apparent on the record, in giving judgment upon the pleadings for the plaintiff, the judgment of the District Court should be reversed.

HENRY STANBERY,
J. HUBLEY ASHTON,
Of Counsel for Plaintiffs in Error.